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| APPLICATION NO.                    | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|------------------------------------|-------------|----------------------|---------------------|------------------|
| 09/651,130                         | 08/30/2000  | Kent Malmgren        | 010315-092          | 1064             |
| 21839                              | 7590        | 11/17/2004           | EXAMINER            |                  |
| BURNS DOANE SWECKER & MATHIS L L P |             |                      | CHANG, VICTOR S     |                  |
| POST OFFICE BOX 1404               |             |                      | ART UNIT            |                  |
| ALEXANDRIA, VA 22313-1404          |             |                      | PAPER NUMBER        |                  |
|                                    |             |                      | 1771                |                  |

DATE MAILED: 11/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/651,130

Applicant(s)

MALMGREN ET AL.

Examiner

Victor S Chang

Art Unit

1771

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 22 October 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,2,4-15 and 20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-15 and 20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 6/3/2004.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Introduction***

1. The Examiner has carefully considered Applicants' amendments and remarks filed on 10/22/2004. Applicants' amendment to claim 1 has been entered.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Rejections not maintained are withdrawn.

### ***Claim Objections***

4. Claim 20 is objected to because of the following informalities:  
In claim 20, please remove unnecessary blank spaces in the sentence.  
Appropriate correction is required.

### ***Rejections Based on Prior Art***

5. Claims 1, 2, 4-15 and 20 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Chen et al. (US 6261679), generally as set forth in section 5 of Office action dated 7/30/2004, together with the following response to argument.

First, the Examiner repeats (see section 16 of Office action dated 7/2/2002) the relied upon prior art as follows: Chen's invention is directed to an open-cell fibrous absorbent structure for use as absorbent articles such as feminine care pads, diapers,

incontinence articles, bed pads and bandages for the intake, distribution, and retention of human body fluids. The open-cell fibrous absorbent structure of Chen may be comprised of a polysaccharide such as carboxymethylcellulose and hydrophilic fibers such as chemically modified cellulosic fibers. Chen also teaches the use of surfactants and cross-linking agents to aid in the formation of their open-cell fibrous absorbent structure.

It is noted that newly amended claim 1 now recites *inter alia* "the foam material comprising a distribution of pores of pore sizes between 0 and 3  $\mu\text{m}$ ".

Referring to Kent Malmgren's Declaration, filed 6/3/2004, Applicants' argument "Mr. Malmgren is an expert skilled in the art of absorbent polymeric foam materials. Mr. Malmgren discusses the relevant facts he used to come to his conclusion as an expert. He discusses the fact that in *Chen et al.* "the cells defined by the foamable binder may have a diameter from about 0.02 mm to about 0.2 mm (20 to 200  $\mu\text{m}$ )" ... he discusses the fact that "the CRC method mainly measures the so-called gel-liquid", which is firmly bound in pores smaller than 3  $\mu\text{m}$ " ... Based on these facts, Mr. Malmgren offers his conclusion as an expert that "[t]he pore size of the material disclosed in *Chen et al.* would not have provide the claimed liquid storage capacity may be achieved" ... Malmgren Declaration is not offering an opinion on the ultimate legal conclusion. Rather, Mr. Malmgren is an expert who made a conclusion based on scientific facts. As such, the Examiner cannot disregard Mr. Malmgren's declaration as lacking probative value." (Remarks, page 6, second paragraph) has been carefully considered, but is not persuasive. The Examiner notes that, first of all, Malmgren's Declaration

draws conclusion (absorbent properties) from indirect parameters (cell diameter and CRC test method) and fails to provide direct evidentiary support such as experimental data, as such it appears to be an opinion which constitutes mere argument and lacks factual support. Further, the Examiner notes that Applicants appear to have ignored that fact that Chen expressly teaches that the absolute cell diameter of the cells can be about 3 mm or less (column 42, lines 26-38), while Chen also teaches several specific smaller cell diameter ranges, with decreasingly smaller cell diameters, nowhere does Chen teach any specific ranges being limiting. As such, the Examiner repeats (see page 3 of Office action dated 7/30/2004) that since the open-cell fibrous absorbent structure of Chen is made by the same material (polysaccharides or polypeptides), and by the same process (freeze drying), it is the Examiner's position that the instantly claimed absorbent properties, such as CRC, is either anticipated by Chen, or an obvious optimization to one skilled in the art, motivated by the desire to obtain an improved absorbent property.

With respect to Applicants' argument "newly amended independent claim 1 and previously present ... independent claims 13 and 15 have a structural limitation such that the foam material must have a distribution of pore sizes between 0 and 3  $\mu\text{m}$ . This highlights the difference in the claimed material and the *Chen et al.* material." (Remarks, page 6, bottom paragraph), the Examiner notes that Chen expressly teaches that the absolute cell diameter of the cells can be about 3 mm or less, as set forth above, which clearly reads on instantly claimed pore sizes, Applicants' argument to the contrary notwithstanding.

**Conclusion**

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Victor S Chang whose telephone number is 571-272-1474. The examiner can normally be reached on 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel H Morris can be reached on 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

VSC

Victor S Chang  
Examiner  
Art Unit 1771

11/4/2004



TERREL MORRIS  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1700